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## Competition Law in Edinburgh

### Mission accomplished–BSkyB/Sky Deutschland/Sky Italia: business as usual?

Posted on [October 8, 2014](#) by [aandreangeli](#)

When it was notified in August, the merger between BSkyB and Sky's German and Italian arms was met with mixed reactions. Several commentators, largely in the media arena, regarded it as an attempt for the acquiring business to streamline its structure and increase corporate value through seeking a "way in" markets that unlike the British one were still showing capacity for expansion. In other courts, instead, the proposed concentration had rung a few alarm bells, due to its temporal proximity to the Murphy preliminary ruling that had de facto outlawed (albeit with limits dictated by demands of protection of intellectual property) the practice of imposing geographic restrictions on the right of subscribers to "make their decoder card travel" across the Union. These concerns had been aired on this blog just after the news of the projected merger had been released: it was argued that a similar merger could have been interpreted as an attempt at de facto allowing the merged entity to engage in practices (such as the imposition of territorial restrictions to pay-TV licenses, condemned by the CJEU in Murphy) that would have been objectionable, had they been resorted to by separate economic entities. Although it was acknowledged that ex post control of prima facie anti-competitive behaviour could have provided a relatively swift and efficient response to these concerns, it was suggested that allowing the merger to proceed could have consolidated practices of territorial segmentation, as opposed to furthering the goal of market integration.

In light of the forgoing, it is difficult to gauge what the implications of the approval of this merger are likely to be: the press release detailing the key aspects of the Commission decision point to the "geographical complementarity" of the activities performed by each of the merging parties as one of the main justifications for approving the merger. In its view, the merged entity would not have been able to increase its economic strength to any significant degree on each of the affected geographic markets; the Commission drew a very clear distinction between the market for the licensing of audio visual programmes free to air or pay TV to individual users and that for the acquisition of the broadcasting rights concerning these programmes. Having regard to the former, the Commission excluded the existence of concerns for competition, on the ground that the parties were active in sufficiently independent national markets, due to their linguistic and cultural internal homogeneity, as not to give rise to overlaps and, after the merger, to any loss of competition between them vis-a-vis the sale of individual subscriptions.

Broadly similar conclusions were adopted in respect of the impact of the merger on rivalry vis-a-vis the acquisition of TV broadcasting rights: the Commission found that the current licensing practices were directly linked to "national territories or language areas". In other words, a combination of "practical obstacles", such as different deadlines governing bidding procedures for the assignation of these rights, and of long-standing adherence to a model of licensing based on single territories meant that the merging parties, would have continued to acquire broadcasting rights each in their own geographic market; in the Commission's view, unless evidence could be found that "multi-territorial licenses" were capable of securing higher revenues, it would have been unlikely that the merged undertaking would have deviated from "individual nation" licensing practices. And finally, the Commission added that in any event even if the holders of the broadcasting rights had decided to grant "multi-territorial" licenses the merged entity would have faced stiff competition from a number of rival broadcasters active across the EU, all vying for the same number of licenses.

It is suggested that the outcome of the "summary" examination of the merger is not entirely unexpected: it is accepted that both the acquisition of the rights to broadcast TV programmes, movies and sports events and the supply of licenses to end users who may wish to view this "paid for" content are organised on the basis of well-

defined geographic areas, each of which tends to be identified with an individual member state or, for those states sharing the same language, the same “linguistic area”. Consequently, it is to an extent inevitable that even after the concentration the merged entity would continue to operate through its Italian, German and UK and Irish arms in appreciably homogeneous and therefore reciprocally distinct markets. What is, however, unclear is the extent to which the rationale for these findings can be reconciled with the approach adopted in *Murphy* by the CJEU.

It should be borne in mind that at the heart of that judgment was a concern for avoiding the segmentation of the common market by restricting the right of holders of legitimately acquired and used decoder card to enjoy the broadcasting services anywhere in the EU: although the CJEU had acknowledged that this right should be limited to preserve the integrity of copyright and of other intellectual property rights that were “independent” from the broadcast, it had taken the clear view that licensors could not limit the geographic scope of the license and thereby extract a “premium profit” in states where broadcasts of specific sports events were regarded as a particularly “prized commodity”. It is argued that the Court’s assessment of the FAPL’s and BSkyB’s licensing practices were predicated, to an extent, on an understanding of the relevant market as one whose boundaries are not necessarily restricted to single Member States or well-identified linguistic territories, but rather as one spanning across the Union taken as a whole—in other words, it could be legitimately argued that the Court, faithful to its commitment to the “single market imperative”, chose to uphold the rationale of free movement of services and, more generally, the demands of open markets that cannot be constrained by national boundaries. It is in fact clear from, among others, para. 139, where the Court rather unsurprisingly referred to practices aimed at recreating the national boundaries among member states as very serious infringements of Article 101 TFEU.

Against this background, to what extent can the decision approving the BSkyB/Sky Deutschland/Sky Italia concentration be reconciled with the Court’s own assessment of territory-based licensing practices, whose ubiquity in the industry and in the case at hand seems to have provided much of the justification for the approval of the merger? It is beyond doubt that in its approval decision the Commission expressly accepted that present and future licensing practices would be inspired by “territorial” principles—in other words, that the merged entity would likely continue to operate through its “national arms” in their respective geographic and linguistic areas both on the “demand side”, i.e. when seeking to bid for and adjudicate contracts concerning new broadcasting rights, and on the “supply side”, that is when vying for business among end users on the retail market. This conclusion can be contrasted with the position adopted by the CJEU in the *Murphy* preliminary ruling, where the Court expressly outlawed territorial restrictions on broadcasting licenses (especially in respect of decoder card usage) as not only injurious to the functioning of the single market but also as eminently anti-competitive: in light of this, and if the merger decision in issue was taken at face value, two options could potentially be envisaged. Either the EU Commission has decided to veer slowly but steadily away from the EU Court of Justice’s position as expressed in *Murphy*, perhaps out of a concern for remaining within the limits of its powers of “ex ante appreciation” of notified mergers. Or the Commission has made a conscious effort to “fit” the assessment of an admittedly relatively wide-ranging and controversial concentration within the scope of the *Murphy* judgment itself.

It is submitted that the second option appears more likely to find a justification: first of all, it should be reminded that, when reviewing a merger, the Commission engages with an ex ante analysis of the notified concentration. Accordingly, it is not concerned with possible infringements of competition law that the merged entity could commit post-clearance, but rather, its assessment focuses on the extent to which as a result of the concentration competition would be significantly impeded. In this specific context, a careful assessment of the confines of the relevant market, especially from a geographic point of view, is especially important: on this point, it should be emphasised that, by their very nature broadcasting services can only be provided in a specific language, which in turn limits their fruition to a well-defined national or “linguistic” area. Accordingly, it is argued that the Commission’s finding that the notified concentration would not significantly hamper rivalry can be justified on account of a careful definition of the relevant market, which reveals contours that are genuinely national, on account of the eminently “language dependent nature” of broadcasting and of the often significant differences

between the rules governing the award of these rights in each Member States; as a consequence, it is submitted that the findings of the Commission appear fully justified when it comes to the actual assessment of the concentration on each relevant market, both on the “supply” and on the “demand side” of it.

However, this is not the end of the story: as was suggested earlier, it may be wondered whether the future of a “single market for broadcasting services”, envisaged by, inter alia, the CJEU in *Murphy*, is to an extent under threat after the merger, on account of the recognition that, even after the emergence of a “multi-national conglomerate”, such as the merged entity, licensing practices are likely to remain national in nature. Admittedly, this is not, strictly speaking, a question that should be relevant when it comes to assessing the lawfulness of the concentration, but rather, an issue that affects the post-merger conduct of the merged entity. In light of the forgoing analysis, should the merged entity seek to stipulate “pan-European” licenses, ostensibly to conform to the principles enshrined in *Murphy*? Or would it still be justified in relying on “national” or “language based” contractual arrangements with its customers? It is suggested that the answer to this question lies once again in the *Murphy* preliminary ruling: in that decision the Court itself acknowledged that arrangements resulting in the partitioning of the internal market will be found to infringe Article 101 TFEU unless “(...) other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition (...)”.

It emerges from the Commission’s clearance decision that by their very nature broadcasting services can only be provided in a specific language, which in turn limits their fruition to a well-defined national or “linguistic” area. Accordingly, it may be argued that the continuing reliance on “national” as opposed to continent-wide arrangements which are stipulated and implemented by each of the “national arms” of the merged entity, may fall within those practices that, as stated in *Murphy*, are not “liable to impair competition”. In other words, the eminently “language-dependent” nature of broadcasting services, together with the need to take into account national preferences in the choice of the broadcasts to be supplied to users in specific areas would form part of the “legal and economic context” of the licensing practices adopted by each of the merging parties, thus excluding at least in principle their anti-competitive nature.

However, it is suggested that this does not mean that the “implementation” of these licensing agreements may in certain cases infringe Article 101 TFEU: it is argued that this would likely be the case if, as it occurred in *Murphy* itself, the licensor placed restrictions on, e.g., the use of decoder cards or other devices that resulted in an impairment of the freedom of movement of these services from one Member State to the other. Similar conclusions could also be reached if the licensor was able to extract from certain licensees, resident in certain Member States, fees that are so high as to earn it a “premium profit”, something that is especially stigmatised by the preliminary ruling.

In conclusion, can it be said that it is “mission accomplished” for BSkyB in Europe? Clearly, the Commission seems to think so, on account of a definition of the relevant markets that, not unwisely, emphasises their eminently “national” and language-dependent confines. However, these very same considerations seem also to demand a high degree of vigilance on the part of the competent competition agencies, to prevent the merged entity from resorting to practices whose impact on competition goes beyond what is consistent with the “legal and economic context” that characterises the broadcasting industry in Europe.

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